IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 2ND NOVEMBER 2007 / 11TH KARTHIKA 1929

SA.No. 934 of 1994(C)

AS.60/1987 of PRL.SUB COURT,KOTTAYAM
OS.155/1983 of MUNSIF COURT, KANJIRAPPALLY

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APPELLANT/1st RESPONDENT/1ST DEFENDANT

ELIKKULAM PANCHAYAT, REPRESENTED BY ITS
EXECUTIVE OFFICER, ELIKULAM PANCHAYAT
KOORALI P.O.

BY ADV. SRI.M.NARENDRA KUMAR
SRI.K.RADHAKRISHNAN

RESPONDENTS:APPELLANT AND 2ND RESPONDENT/PLAINTIFF AND 2ND DEFENDANT

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1. SCARIA KURIAN, MANDAPATHIL
   ELIKULAM KARA,
   ELIKULAM VILLAGE, NOW RESIDING AT PINNAKKANADU
   THIDANADU KARA, KONDOOR VILLAGE.

2. KERALA STATE REPRESENTED BY DISTRICT COLLECTOR
   KOTTAYAM.
   V.B.JINNAH

   BY ADV. SRI.K.P.VIJAYAN
   SRI.BOBY MATHEW
   V.B.JINNAH FOR R1

   BY GOVERNMENT PLEADER SRI.L.G.SURESH BABU

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 2/ 11 /2007 THE COURT ON 02/11/2007 DELIVERED THE
FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 934 OF 1994

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Dated this the 2nd day of November, 2007

JUDGMENT

First defendant Elikkulam Panchayat in O.S.155/1983 on the file of Munsiff Court, Kanjirappally is the appellant. First respondent is the plaintiff and second respondent second defendant in the suit. First respondent originally instituted the suit seeking a decree for permanent prohibitory injunction. Plaint was subsequently amended seeking a decree for declaration of title and possession. Plaint schedule property is 25 cents and excess land (virivu) in survey No.622/3 of Elikkulam village, which is the southern portion of 2.75 acres of land in that survey number. What was contended by first respondent in the plaint was that plaint schedule property originally belonged to his father under Ext.A2 partition deed and under Ext.A1 partition deed this was allotted to first respondent and since then he has been in possession

of the property while so appellant contended that Anjili tree cut from the property is from the puramboke land. A notice was received from the Village Officer not to remove the logs of Anjili tree cut. It was contended that they have no right to do so and defendants are to be restrained from obstructing the removal of the anjili tree or peaceful possession of the property by first respondent. After the filing of written statement plaint was amended incorporating a plea that plaint schedule property has been in the possession of first respondent and his predecessors for more than 100 years and even if it is found that the property from which anjili tree was cut is a puramboke land rights of the Government has been lost by adverse possession and first respondent has perfected title by adverse possession and is entitled to a decree for declaration of title. Appellant filed a written statement admitting the title and possession of first respondent to the property in survey No.622/3 and contending that

adjoining property in survey No.624 is a puramboke land vested with the appellant panchayat and first respondent has no right or title over the same. It was also contended that there is no virivu in survey No.623/3 and under Ext.A2 partition deed father of first respondent and under Ext.A1 first respondent did not derive any right or title to any portion of property in survey No.624 and anjili tree was cut from puramboke land and first respondent has no right over the tree or the land and therefore suit is only to be dismissed.

2. Learned Munsiff on evidence of Pws.1 and 2, DW1 and Exts.A1 to A4, B1 and B2 and C1 and C2 found that the disputed portion of property having an extent of 4.390 cents as identified and demarcated by Commissioner, is in survey No.624/4 and it is a Government puramboke land. Learned Munsiff also found that first respondent has no right or title to the property in survey No.624/4 and has no title to that property under Exts.A1 and A2. The trial court did not consider the claim

for adverse possession and dismissed the suit on the ground first respondent did not establish title to the disputed portion of property in survey No.624/4. First respondent challenged the decree and judgment before Sub Court, Kottayam in A.S.60/1987. Learned Sub Judge on reappreciation of evidence set aside the finding of the trial court. It was found that first respondent and his predecessors have been in possession of disputed property from 1094 M.E and therefore title of the Government was lost by adverse possession and granted a decree declaring title of first respondent to 4.390 cents in survey No.624/4 along with the remaining portion of plaint schedule property in survey No.622/3. Consequential decree for injunction was also granted. It is challenged in the appeal.

3. The appeal was admitted formulating the following substantial question of law.

Whether without establishing the

ingredients necessary to prescribe title by adverse possession whether first appellate court was justified in granting a decree for declaration of title by adverse possession..

4. Learned counsel appearing for appellant was heard. There was no representation for first respondent.

5. The suit was framed claiming title to the plaint schedule property on the strength of Exts.A1 and A2. The case was that plaint schedule property including the disputed portion of 4.390 cents in survey No.624, was in possession of the predecessor in interest of first respondent and under Ext.A2 partition deed it was allotted to the share of father of first respondent and subsequently under Ext.A1 partition deed it was allotted to the share of first respondent and

therefore he has title to the plaint schedule property. In the plaint also decree was sought for the property in survey No.622/3 alone and survey No.624. Even after submission of Ext.C1 plan and C2 report disclosing that the disputed 4.390 cents is not in survey No.622/3 but in survey No.624, plaint was not amended. It remains as 25 cents in survey No.622/3.

6. Appellant is not disputing the right and title of first respondent to the property in survey No.622/3 which originally belonged to his father under Ext.A2 and obtained by first respondent under Ext.A1. The dispute is only with regard to the southern portion having an extent of 4.390 cents. Exts.C1 and C2 establish that the disputed portion is in survey No.624 and not in survey No.622/3. This aspect was concurrently found by courts below. Under Exts.A1 and A2, first respondent cannot claim title to any portion of the property in survey No.624. Title of first respondent to the property in survey No.622/3 was not disputed at

all. Therefore first respondent could claim title to the disputed property only by adverse possession. The question is whether first respondent has established title perfected by adverse possession.

7. As rightly pointed out by learned counsel appearing for appellant what was contended in the plaint was that from the notice sent by second respondent, it was gathered that the disputed property is a puramboke land and if it is found that defendants have right over the said property being a puramboke land, that right has been lost because of the continuous possession of first respondent and his predecessors for the last more than 100 years. The amended portion of plaint does not disclose when the possession became adverse. At the same time amended portion of the plaint itself reveals that the fact that the disputed portion of the property is a puramboke land was not known to first respondent and it was not admitted even in the plaint. Case was that

only on getting a notice from second respondent first respondent came to know about the fact. The plaint allegations establish that the said notice was served on him just prior to the institution of suit, when first respondent cut the anjili tree from the disputed property. Therefore even as per the allegations in the plaint, what was claimed was that first respondent was aware that title of the disputed property vests with the Government only some months prior to the institution of the suit. Without knowing who is the true owner, first respondent cannot be heard to contend that he has been in possession of the property adverse to the true owner, the Government. Learned counsel also pointed out that when examined as PW1, first respondent categorically admitted that he came to know that the disputed portion is a puramboke land three years prior to the date of his examination. He was examined in 1986 and suit was filed in 1983. Therefore his knowledge that the disputed portion of the property belongs to Government could

only be just prior to the institution of the suit. In such circumstance, the question is whether finding of first appellate court that first respondent has perfected title by adverse possession is sustainable.

8. **Apex Court in Deva v. Sajjan kumar (2003) 7 SCC 481)** had occasion to consider a similar evidence tendered by the plaintiff in that suit claiming adverse possession. In that case when plaintiff was examined, he deposed that the disputed portion was in his possession since 10 to 12 years and that property is in his possession from the very beginning and after filing of the suit he came to his knowledge that he was in possession of the land in survey No.453 and before filing the suit patwari and others came to the land for measurement and they told him that the land is in survey No.453 and then he told that he has been in possession of the property since the beginning. The question considered was whether in the light of the said evidence, the plea of adverse possession

can be sustained. The Apex Court held:-

> "11. The deposition extracted above, in any case, negatives the defendant's case of having prescribed title by adverse possession from the year 1940. The animus to hold the land adversely to the title of the true owner can be said to have started only when the defendant derived knowledge that his possession over the suit land had been alleged to be an act of encroachment--on the plaintiff's survey number.
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> 12. The abovequoted

> admission contained in the defendant's deposition does not make out a case in his favour of having acquired title by adverse possession. Mere long possession of the defendant for a period of more than 12 years without intention to possess the suit land adversely to the title of the plaintiff and to the latter's knowledge cannot result in acquisition of title by the defendant to the encroached suit land."

As stated earlier, what was contended in the plaint was that first respondent has title to the property under Exts.A1 and A2. It was only

contended that in case it is found that it is a puramboke land, as first respondent and his predecessors have been in possession of property for more than 100 years, they have perfected title by adverse possession. Without recognising the title of the true owner, first respondent is not entitled to claim adverse possession as till then he cannot have the animus to possess it as against the true owner.

9. Apex Court in **Krishnamurthy S.Setlur v. O.V.Narasimha Setty ((2007) 3 SCC 569)** laid the principle as follows:-

> "In the matter of adverse possession, the courts have to find out the plea taken by the plaintiff in the plaint. In the plaint, the plaintiff who claims to be owner by adverse possession has to plead actual possession.

> He has to plead the period and the date from which he claims to be in possession. The plaintiff has to plead and prove that his possession was continuous, exclusive and undisturbed to the knowledge of the real owner of the land. He has to show a hostile title. He has to communicate his hostility to the real owner."

When first respondent is not recognising the title of the State or the fact that disputed portion of property is a puramboke land, he cannot claim that he has been in possession of property with the animus to possess it against Government, the true owner of property. Moreover, when what was set up by first respondent is a rival title, plea of

adverse possession will not lie without admitting the title of first respondent. Apex Court in **Vidya Devi v. Prem Prakash (1995) 4 SCC 496)**held:-

> "It is a matter of fundamental principle of law that where possession can be referred to a lawful title, it will not be considered to be adverse. It is on the basis of this principle that it has been laid down that since the possession of one co-owner can be referred to his status as co-owner, it cannot be considered adverse to other co-owners."

A person who bases his title on adverse possession must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed. Where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was

> hostile to another's title. One who holds possession on behalf of another,does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all."

When the very case of first respondent was that he has been in possession of property as the real owner and has no case that he has been in possession of property with the knowledge that

the property belongs to the Government, it being a puramboke land, he cannot be in possession with the the animus to possess it against the true owner. On the evidence, it can only be held that first respondent who claim that he came to know that disputed property is a puramboke land and is in survey No.624 only just prior to the institution of the suit, cannot prescribe title by adverse possession as found by first appellate court. On the evidence it can only be found that first respondent has not perfected title by adverse possession. The appeal is allowed. The decree and judgment granted by Sub Court, Kottayam in A.S.60/1987 is set aside. O.S.155/1983 on the file of Munsiff Court, Kanjirappally stand dismissed. No cost.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006